Industrial Law Journal, Vol. 45, No. 3, September 2016

RECENT CASES

NOTE

Procedural Fairness on Appeal: Is *O'Cathail* No Longer Good Law?

The ability of appellate courts to consider whether proceedings in the Employment Tribunal are tainted by procedural unfairness has been severely limited by a line of case law which suggests that the Employment Appeal Tribunal should adopt a *Wednesbury* standard of review to the issue. In this article, I will explain why that approach, as exemplified by *O'Cathail*, is wrong and why it is inconsistent both with earlier authorities on the jurisdiction of the Employment Appeal Tribunal and with the 2013 Supreme Court decision in *Osborn*. I conclude by examining the approach taken by the Employment Appeal Tribunal to *O'Cathail* in two recent cases and noting the re-emergence of the 'hard-edged' approach to matters of procedural fairness.

1. THE EAT'S JURISDICTION IN RELATION TO PROCEDURAL FAIRNESS

As the number of individuals who represent themselves before courts and Tribunals has steadily increased, so too has the number of appeals to the Employment Appeal Tribunal and other courts brought on the grounds that the claimant or respondent did not have a fair hearing in the Employment Tribunal.

The Employment Appeal Tribunal's jurisdiction to hear such appeals is governed by s.21(1) of the Employment Tribunals Act 1996 ('the 1996 Act'), which provides that 'An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or *arising in any proceedings before*, an [employment tribunal] under or by virtue of…' (emphasis added).

It is now well established that the Employment Appeal Tribunal's jurisdiction includes appeals relating to procedural errors or irregularities in the conduct of Employment Tribunal proceedings. In *Connex South Eastern Ltd v Bangs*,[1] the Court of Appeal had to consider whether a complaint about unreasonable delay in promulgating the decision of the Employment Tribunal came within s.21(1) or not.

[1] [2005] ICR 763.

Mummery LJ (with whom Dyson LJ and Dame Elizabeth Butler-Sloss P agreed) held that if the delay amounted to a 'serious procedural error' or 'material irregularity', then this would fall within s.21(1) of the 1996 Act.

As he explained at 766B-C:

> A question of law is not confined to misconstruing or misapplying substantive law in the decision itself. *It may also arise from a procedural error or irregularity in the conduct of the proceedings before the tribunal, which, depending on the nature and gravity of the error or irregularity, may lead to a successful appeal and even to an order for the case to be reheard by another tribunal*. (emphasis added)

Crucially in *Connex* the Court of Appeal recognised that as s.21 makes clear, a question of law can arise during the course of the proceedings, and that if an issue is raised as to whether or not a person has had a fair trial in the Employment Tribunal, then this is capable of giving rise to a separate question of law.

The decision in *Connex* is unarguably correct. If the Employment Appeal Tribunal did not have jurisdiction in relation to questions of procedural fairness, or such jurisdiction was expressly excluded by s.21 or otherwise; then the High Court would have jurisdiction by way of the collateral process of judicial review. The High Court's supervisory jurisdiction extends to ensuring that inferior courts, such as the Employment Tribunal, observe the rule of law. However, although judicial review is available as 'an ultimate safeguard' where no other remedy exists, provided that parties *can* appeal to the Employment Appeal Tribunal regarding matters of procedural fairness this will in the vast majority of cases provide a satisfactory alternative to judicial review (*R (Cart) v Upper Tribunal*[2] and *General Medical Council v Michalak*).[3]

In *Connex* Mummery LJ emphasised the differences between the jurisdiction of the Employment Appeal Tribunal and the appellate jurisdiction of the senior civil courts.[4] However, such differences should not be overstated. While it is right that there is no right of appeal to the Employment Appeal Tribunal on a matter of fact (absent perversity), in matters of procedural fairness the jurisdiction of the ordinary civil courts and the Employment Appeal Tribunal is very similar if not identical. CPR r.52.11(3) provides that 'The appeal court will allow an appeal where the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court'. As is explained above, the statement of the law as contained at r.52.11(3)(b) would be equally apt to describe the jurisdiction of the Employment Appeal Tribunal in matters of procedural fairness.[5]

[2][2012] 1AC 663 at [676]–[677].

[3][2016] EWCA Civ 172 at [37]–[46].

[4]At 766[E].

[5]The Civil Procedural Rules do not of course apply to the Employment Tribunal or the Employment Appeal Tribunal.

2. THE CORRECT STANDARD OF REVIEW

While the matter of the Employment Appeal Tribunal's jurisdiction to entertain procedural fairness appeals is now fairly well settled, the question of how such appeals should be approached by appellate courts is not.

In a number of earlier decisions concerning a variety of different types of alleged procedural unfairness, the Court of Appeal accepted that the issue was a 'hard-edged question' for the appellate court. Accordingly the appellate court *could* substitute its own view of what procedural fairness required in the circumstances. Thus, in *Connex*, a delay case, the Court of Appeal asked itself whether the fact of the delay had created a real risk that the parties were deprived of the benefit of a full and fair trial.[6]

Similarly, in the case of a member of the Employment Tribunal ostensibly sleeping during the course of an Employment Tribunal hearing, the Court of Appeal held in *Stansbury v Datapulse plc and another*[7] that the Employment Appeal Tribunal had to determine itself (whether by hearing evidence, or by proceeding on the assumption that the allegations had been established) whether the matters complained of were sufficient to vitiate the fairness of the hearing. Finally, in *Lodwick v Southwark London Borough Council*,[8] a case in which bias was alleged, the Employment Appeal Tribunal held that it should consider the proceedings before the Employment Tribunal as a whole, and decide itself whether a perception of bias arose.[9]

This 'hard-edged' approach is consistent with the approach taken by the ordinary civil courts, both when exercising their appellate jurisdiction and on judicial review. Thus, in *R (Mahfouz) v General Medical Council*,[10] Carnwath LJ held at paragraph 19 that 'Where it is alleged that a lower tribunal has acted in breach of the rules of fairness or natural justice, the court is not confined to reviewing the reasoning of the tribunal on *Wednesbury* principles. It must make its own independent judgment. . . . Furthermore, the question whether there has been a breach of those principles is one of law, not fact'.[11] Similarly, in *Terluk v Berezovsky*,[12] the Court of Appeal considered an appeal against a decision by a High Court Judge not to adjourn a trial. Sedley LJ (with whom Mummery LJ agreed) held at paragraphs 18–19 that the Court of Appeal had to consider itself whether the procedural decision was fair, taking a 'non-Wednesbury approach'. However, he emphasised that the Court of Appeal was concerned with

[6] See pp 780–1.
[7] [2004] ICR 523 at [531]–[532].
[8] [2004] ICR 884.
[9] See p 890.
[10] [2004] EWCA Civ 223.
[11] See M. Fordham, *The Judicial Review Handbook*, 6th edn (Oxford: Hart Publishing, 2012) at 16.5.1 for further examples of the approach of the court to procedural fairness.
[12] [2010] EWCA Civ 1345.

what was fair in the circumstances identified and evaluated by the judge.[13] He held that this approach was consistent with the jurisprudence on Article 6.

Curiously, therefore, the Court of Appeal endorsed a wholly different approach in *O'Cathail v Transport for London*[14] and *Riley*[15] *v The Crown Prosecution Service*.[16] The *O'Cathail* decision concerned a failure to adjourn a hearing and followed a series of apparently conflicting Employment Appeal Tribunal decisions on the issue.[17]

Mummery LJ giving judgment for the court, distinguished *Terluk* in which he had himself sat, and held at paragraph 44 that:

> The crucial point of difference from *Terluk's* case is that decisions of the employment tribunal can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the employment tribunal has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The tribunal's decisions can only be questioned for errors of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the Employment Appeal Tribunal should continue to adopt rather than the approach in *Terluk* as summarised in the headnote [2012] ICR 561 quoted above.

The Court of Appeal's decision in *O'Cathail* ignores the fact that some discretionary case management decisions will result in the proceedings being vitiated by procedural unfairness. Further, it fails to recognise that, in addition to any concerns raised about the Employment Tribunal's exercise of discretion (which might properly be addressed using the approach it advocated), as Lord Justice Mummery had himself recognised in *Connex*, there can be a *separate question of law* for the Employment Appeal Tribunal as to whether the parties have had a fair hearing below.[18] Finally, in

[13] In doing so, the Court of Appeal applied *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2.

[14] [2013] ICR 614.

[15] In *Riley*, Longmore LJ (with whom Mummery LJ and Rimer LJ agreed) simply applied *O'Cathail*, holding at [4] that 'the appeal has to be disposed of but by reference to the *Wednesbury* test and can only succeed if there was an error of legal principle in the ET's approach or perversity in the outcome'.

[16] [2013] IRLR 966. This is even more curious given that Mummery LJ gave the leading judgment in *Connex*.

[17] See, eg, *D'Silva v Manchester Metropolitan University (unreported)*, 11 February 2011.

[18] While in theory a party could complain that any type of case management decision (or other decision or conduct) had rendered a hearing unfair, in practice it is difficult to see how such an argument could succeed in relation to some discretionary case management decisions, eg, a decision that a party provide additional information.

O'Cathail, Mummery LJ overstated the differences between the jurisdiction of the civil courts and that of the Employment Appeal Tribunal.

The consequences of the *O'Cathail* judgment are 3-fold, all of which are highly unsatisfactory. First, the Employment Appeal Tribunal must take a different approach to questions of procedural fairness to that taken by all other courts and Tribunals, which have adopted the *Terluk* approach.[19] There is no good reason for this differing approach, and indeed the only justification for it appears to be the misconception about the differences between the two jurisdictions as explained above. Second, the Employment Appeal Tribunal must alter its approach to allegations of procedural unfairness depending on the particular type of procedural unfairness alleged; adopting the 'non-*Wednesbury* approach' to delay, sleeping and bias cases in light of the case law set out above, and the '*Wednesbury* approach' to adjournment cases and other discretionary case management decisions. Again, there is no good reason for this distinction. Third, the *O'Cathail* approach means that it is very difficult for such appeals to succeed in practice.

3. DEVELOPMENTS SINCE THE *O'CATHAIL* DECISION

In *R (Osborn) v Parole Board*,[20] the Supreme Court considered a refusal by the Parole Board to grant an oral hearing. The Supreme Court, who were referred to *Terluk*, held that the court must determine for itself whether a fair procedure has been followed below and that a review that adopts a Wednesbury approach is not sufficient.[21] While *Osborn* concerned the decision of a public body (the Parole Board), the Supreme Court applied the approach taken by the House of Lords in *Gillies v Secretary of State for Work and Pensions*,[22] an appeal concerning allegations of bias made against a disability appeal tribunal.[23] It is in my view very clear that *O'Cathail* can no longer be good law in light of the Supreme Court's decision in *Osborn*. However, even though *Osborn* was decided in 2013, the Employment Appeal Tribunal has continued to adopt the *O'Cathail* approach to adjournments.[24]

[19] The *Terluk* approach has been applied by the Upper Tribunal in *LO'L v SSWP* [2016] UKUT 0010, and the Court of Appeal in *Razzaq v Ageas Insurance Ltd* [2015] EWCA Civ 752.

[20] [2013] 3 WLR 1010.

[21] See para 65 of Lord Reed's judgment.

[22] [2006] 1 WLR 781.

[23] In *Gillies*, the House of Lords held that a question about whether a tribunal had acted in breach of the principles of natural justice is essentially a question of law and that there can only be one correct answer.

[24] See, eg, *Pye v Queen Mary University of London* UKEAT/0151/15, where unfortunately Mrs Justice Laing does not appear to have been appraised of relevant developments in the common law or taken to *Osborn*.

While the impact of *Osborn* has only very recently been considered by the Employment Appeal Tribunal (see below), it is of note that in *British Broadcasting Corporation v Roden*,[25] Simler J declined to apply a Wednesbury standard of review when considering a decision by an Employment Tribunal to make an anonymity order. In *Roden*, the Employment Appeal Tribunal was asked to consider the lawfulness of a permanent anonymity order, and in particular issues arising under Articles 6 and 8 of the European Convention on Human Rights. During the hearing, counsel for Mr Roden, relying on *O'Cathail*, argued that the decision to make the anonymity order was a matter of discretion which the Employment Appeal Tribunal could only interfere with in very limited circumstances.[26] Simler J dismissed this argument, holding at paragraph 34 that:

> Although there are conflicting dicta in the authorities, in my judgment the making of such an order upon reconciling the competing human rights engaged, is not an exercise of discretion at all. There is a right or wrong answer to the question in each particular case.[27]

While the focus in *Roden* was on the interference with rights enshrined in the European Convention on Human Rights, rather than on procedural irregularity, the judgment of Simler J confirms the need for a 'hard-edged' approach when the Employment Appeal Tribunal is considering interference with Convention rights.

The *Osborn* decision was finally considered by the Employment Appeal Tribunal in *Rackham v NHS Professionals Ltd*.[28] In *Rackham*, the Employment Appeal Tribunal recognised the difficulties with automatically applying the *O'Cathail* approach to all case management decisions, including decisions which result in the proceedings being vitiated by procedural unfairness. The Employment Appeal Tribunal (Langstaff P presiding) held at paragraph 43 that:

> . . . there are some cases in which it is plain that a Tribunal has nothing that might sensibly be called a case management discretion to exercise in order to secure fairness. An example might be that of Claimants, witnesses or Respondents who have no English language. If they have a foreign tongue, an interpreter is needed. If they are dumb, they need sign language to convey what they mean. If they are deaf, they need someone to assist them with understanding. Without this they simply cannot get access to the justice that is required. If such a case were to proceed

[25] [2015] IRLR 627.

[26] See para 33 of the judgment.

[27] She did however consider the judge's decision on the basis of an exercise of discretion in the alternative.

[28] UKEAT/0110/15/LA. Although the issue was raised in *U v Butler & Wilson Ltd* (2014) UKEAT/0354/13, [2014] All ER (D) 34 (Sep), the EAT decided that case on other grounds.

without the necessary steps being taken, there would be a material procedural irregularity that, just as in a case of bias, would fall for assessment on appeal in which the appellate body, initially the Appeal Tribunal, acts as fact-finder.

The Employment Appeal Tribunal recognised that a different approach needed to be taken to case management decisions which raised 'essential matter(s) of fairness', and held at paragraph 49 that 'we would be very hesitant before suggesting that a pure *Wednesbury* approach was appropriate in any case in which it appeared to the reviewing court that it would have been reasonable to have made an adjustment if that adjustment appeared necessary to obtain proper equality of arms for someone with a relevant disability'.

Accordingly, the Employment Appeal Tribunal decided that the appropriate question for it to consider was 'whether there was any substantial unfairness to the Claimant in the event', and that '[w]e have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties'. Although the Employment Appeal Tribunal does not appear to have been referred to the earlier authorities on procedural fairness as set out above,[29] the approach it endorsed is of course markedly similar to the 'hard-edged' approach advocated in those cases, and indeed its approach is consistent with both *Terluk* and *Osborn*.

Unfortunately, the Employment Appeal Tribunal in *Rackham* did not grapple with the thorny question of whether *O'Cathail* remains good law notwithstanding *Osborn* and nor did it expressly address the misconception (as perpetuated by *O'Cathail*) that a question of law cannot arise from a procedural error or irregularity in the conduct of proceedings before an Employment Tribunal.[30]

4. CONCLUSION

The decision in *Rackham* is a clear departure from a longline of authority which erroneously viewed all decisions by Employment Tribunals regarding matters of procedural fairness as discretionary decisions which appellate courts were virtually unable to interfere with. While the status of the *O'Cathail* decision is still to be determined, *Rackham* heralds the resurgence of the 'hard-edged' approach to all

[29] Instead, it was urged by both counsel to apply the 'proportionality approach' to review.

[30] Although Langstaff P did comment at [42] that '[t]here might possibly be a difference between the approach to the common law duty of fairness applicable to decisions on appeal from civil cases and those where a point of law needed to be established, as in employment appeals'. These comments rather suggest that Langstaff P supports the view that the differences between the two jurisdictions have been overstated.

procedural fairness appeals and recognises the need when determining such appeals for the Employment Appeal Tribunal to substitute its own view of what procedural fairness requires in the circumstances.

CLAIRE DARWIN
Matrix Chambers
clairedarwin@matrixlaw.co.uk
doi:10.1093/indlaw/dww018